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No. 306

IN THE

Supreme Court of the United States

October Term, 1962

ROBERT E. WALSH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

To The Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States.

Robert E. Walsh respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

In this judgment the court of Appeals affirmed the judgment of the District Court, which found, Petitioner guilty of alleged violations of Title 18, U.S.C., Section 371 (conspiracy), and two separate violations of Title 18, U.S.C., Section 474 (unlawful reproduction and unlawful possession, respectively).

Defendant was sentenced to concurrent three-year terms on all counts on July 7, 1961 (Appendix, page 35, below).

Judgment of the Court of Appeals was entered on July 10, 1962 (Appendix, page 41, below).

No petition for rehearing has been filed in the Circuit Court of Appeals for the Sixth Circuit, nor has any extension respecting this petition for review by certiorari been sought.

OPINIONS BELOW

The opinion of the Court of Appeals appears in the appendix hereto at page 36. The oral opinion of the District Judge is set out in the Transcript of Record at pages 493-512a.

JURISDICTION

The Petitioner herein requests review of an order of the United States Court of Appeals for the Sixth Judicial Circuit affirming the finding and judgment of the United States District Court for the Northern District of Ohio, Eastern Division, which found Petitioner guilty of all three counts of the indictment and sentenced Petitioner to commitment to the custody of the Attorney General for three years on each of the three counts, same to run concurrently.

Jurisdiction to review the judgment heretofore entered by the Court of Appeals for the Sixth Circuit below is found in Title 28, U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Can a Defendant be convicted of conspiracy when his alleged co-conspirator, as a government witness, categorically denied voluntary participation in the alleged counterfeit operation, and testified that he acted not voluntarily, but rather, solely out of fear and concern for his own safety and that of his family?

2. Was it proper to foreclose Petitioner in his efforts to impeach a defense witness who had, prior to trial, and in the presence and hearing of other witnesses, corroborated Petitioner regarding a crucial element of the defense, but who, upon trial, testified contrary to such previous statements, defense counsel having been fully aware of the nature of such pretrial statements, as was apparent from the record?

3. Was it proper for the court to exclude relevant, material, and competent defense evidence (1) which bore upon the impossibility of Petitioner having possessed and assisted in the manufacture of counterfeit currency; (2) which related to pretrial remarks of the counterfeiter's wife which corroborated Appellant's testimony and which evidenced an extortion attempt against this defendant for truthful testimony; and (3) which related to telephone conversation (which were taped and offered into evidence) wherein the wife of the government's primary witness demanded Ten Thousand Dollars ($10,000.00) for truthful testimony on the part of her husband and herself?

4. Was it proper for the District Court to overrule Petitioner's motions for judgment of acquittal and to make a finding of "Guilty" when the evidence was palpably insufficient to sustain the Court's action in either respect?

STATUTES AND RULES INVOLVED

Title 18, U.S.C., Section 371

Conspiracy to Commit Offense or to Defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, U.S.C., Section 474

Plates or Stones for Counterfeiting Obligations or Securities

Whoever, having control, custody, or possession of any plate, stone, or other thing, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose printing, any obligation or other security of the United States, uses such plate, stone, or other thing, or any part thereof, or knowingly suffers the same to be used for the purpose of printing any such or similar obligation or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; or

Whoever makes or executes any plate, stone, or other thing in the likeness of any plate designated for the printing of such obligation or other security; or

Whoever sells any such plate, stone, or other thing, or brings into the United States any such plate, stone, or other thing, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate, stone, or other thing be used for the printing of the obligations or other securities of the United States; or

Whoever has in his control, custody, or possession any plate, stone, or other thing in any manner made after or in the similitude of any plate, stone, or other thing, from which any such obligation or other security has been printed, with intent to use such plate, stone or other thing, or to suffer the same to be used in forging or counterfeiting of such obligation or other security, or any part thereof; or

Whoever has in his possession or custody except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security made or executed, in whole or in part, after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; or

Whoever prints, photographs, or in any other manner makes, or executes any engraving, photograph, print, or impression, except to the United States, or brings into the United States, any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States; or

Whoever has or retains in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the proper officer of the United States —

Shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

STATEMENT OF THE CASE

I. Petitioner's Evidence

Petitioner, a thirty-four year old former Cleveland Detective, was, in the Spring of 1960, importuned to associate himself with an enterprise the purpose of which was to counterfeit horse race tickets for presentation at the several tracks in Northeastern Ohio (323a). He was, on this occasion, introduced to Hugh Lynn by one Gamblin. Petitioner thereupon expressed his lack of interest in the counterfeit ticket scheme (324-325a).

Petitioner, by reason of his interest in Gamblin's financial well-being, assisted Gamblin in securing the repair of

a printing machine and in securing paper (332, 333a), ostensibly, for the race track ticket scheme. Petitioner's interest in Gamblin was centered about the necessity that Gamblin earn and remit, as restitution, the sum of Three Thousand Dollars ($3,000.00) incident to a home-repair overcharge in which Gamblin and Petitioner's younger brother were then involved (324a).

Petitioner did not see Lynn after the aforesaid introduction until the 3rd or 4th day of June, 1960. In the interim Lynn had, unknown to Petitioner, activated a currency counterfeiting operation.

On the 3rd or 4th day of June, 1960 Gamblin, to substantiate his assertion that he and Lynn were engaged in a promising operation, took Petitioner and one Hogan to the Lynn home (340a). Lynn, although suspicious, admitted the visitors to his basement where Petitioner observed evidence of a substantial currency counterfeiting operation (341a). Realizing the jeopardy which his visits to the paper company and Addressograph-Multigraph, in the company of Gamblin, had thus placed him, Petitioner became enraged, upset the printing machine, tore up negatives and currency, assaulted Lynn, Lynn's wife and Gamblin and hurriedly left the premises (464, 465, 466a).

During the foregoing Lynn had protested that Petitioner was supposed to have the "fix" (341, 342, 343, 463a).

The foregoing is substantiated by Hogan (168-175a).

Petitioner did not thereafter see Lynn, visit Lynn's home, nor see any counterfeit currency (344a).

Petitioner thereafter resumed his employment as bartender-acting manager in the Coral Bar in Cleveland, at least sixty miles from the counterfeit operation, on June 6, 1960 after an unproductive period in the home repair field in the general Youngstown area (444a). Thereafter Petitioner worked steadily at said bar until trial, he having,

throughout the week of June 5 through June 11, 1960, operated said bar exclusively by reason of the absence of the owner (266, 267, 275, 276a), duty hours having been from approximately noontime to the 3:30 A.M. closing time (267, 268a). In addition to functions performed during duty hours, Petitioner was required to spend at least one hour after the 3:30 A.M. closing time in clean-up work and in preparing necessary banking data (267, 268, 320, 321a). Inasmuch as the issue of time is of the essence in Petitioner's defense the testimony of Goldstein, owner of the Coral Bar, is believed crucial. Goldstein testified that during the week of June 5 through June 11, he spoke telephonically with Petitioner at the Coral Bar at various hours during each evening, as was his general custom (275a). The banking data was, on each day during said week, prepared by Petitioner in Petitioner's handwriting (281, 286, 287, 288a). Business records of the Coral Bar substantiate Petitioner's employment thereat during the week of June 5 through June 11, 1960. *It is during the nights of this particular week that the counterfeiter testified that Petitioner was in Youngstown assisting him in the counterfeit operation* (74, 81, 83, 87a). The counterfeiter's testimony against Petitioner is based chronologically upon the June 1, 1960 purchase of a vacuum frame, and cannot be true if Petitioner was working during the hours mentioned by Lynn. No counterfeit currency produced by Lynn's operation could have been prepared or possessed until June 8th or 9th, 1960. Petitioner was working in Cleveland at this time. After the return of the indictment herein, following various anonymous telephone calls, regarding the payment of Ten Thousand Dollars ($10,000.00) for truthful testimony, Shirley Lynn, the counterfeiter's wife called Petitioner and asked that Petitioner visit her in Youngstown. This conversation was tape-recorded (375, 377a). Peti-

tioner, Petitioner's uncle and a Cleveland Police Officer who was concealed in the trunk of an automobile, met with Shirley Lynn on March 21, 1961. Mrs. Lynn verified Petitioner's testimony that he had visited the Lynn home only once; that upon observing the counterfeit operation he had became enraged, had assaulted her, and that if the truth were told Petitioner would be exculpated. Mrs. Lynn demanded the sum of Ten Thousand Dollars ($10,000.00) in specified denominations (292-295, 377-382, 478-481a). Thereafter, Mrs. Lynn contacted Petitioner's uncle on various occasions and repeated her demand for Ten Thousand Dollars ($10,000.00) in small denominations (479-481a). These conversations were likewise taped. This evidence was ruled incompetent as was the content of the various taped conversations (383, 384, 385a). The Court refused to permit Petitioner to impeach Mrs. Lynn who was called as a defense witness and who testified in contradiction of her statements made in the course of the Youngstown conversation.

Petitioner offered the testimony of one Donald Long, who had been a jail-mate of the counterfeiter, Lynn (110, 223, 226, 236, 237, 240, 241a). Lynn had asked Long to deliver a message the tenor of which was the requirement that Petitioner pay Lynn's wife the sum of Ten Thousand Dollars ($10,000.00). Lynn had thereupon stated that Petitioner had struck him in an affray in his basement, thereby corroborating the testimony of the Petitioner (232a).

II. The Government's Evidence

The Government's evidence consisted primarily of the testimony of Hugh Lynn, the individual who had processed and printed the counterfeit currency in this matter. Various employees of Addressegraph-Multigraph and of the Union Paper and Twine Company testified in regard to Peti-

tioner's visits to those establishments. The Counterfeiter, who had a long prison record, testified that on the evening following his introduction to Petitioner, Petitioner asked Lynn to join a counterfeit operation. Lynn refused (29, 30, 33, 34a). Three evenings later Petitioner visited Lynn's home and threatened Lynn's wife and children should Lynn not participate in the project. Lynn thereupon entered into the project (36-38a). *Lynn testified that he entered into the operation only because of fear and that there was never any willingness on his part to participate in the counterfeit scheme* (133, 134a). Thereafter, in the course of several alleged visits, Lynn, the counterfeiter, stated that he was completely unfamiliar with the process, the supplies, and the photography requisites incident to such operation; that nothing pertaining to secrecy was mentioned; and that no instructions were given as to the background of the photographer who would be required nor of his compensation (30, 32, 37, 38, 40, 42, 47, 41, 116, 117, 118, 119a).

The counterfeiter further testified that he learned the counterfeiting process by trial and error and through the reading of pamphlets (60, 118, 120a).

In regard to the photographer who prepared the negatives of currency which were used, a friend named Johnson casually visited Lynn's home in the company of a stranger whose name Lynn never did learn (47a) and Lynn casually outlined his photographic problem. Surprisingly enough the stranger happened to be a photographer and without further ado, Johnson and the stranger prepared all of the necessary negatives (52-58a) at high noon in the direct rays of the sun (49a). It is worthly of note that Long testified that Lynn had, in one of his jail conversations touched upon the requirement that direct sunlight be used in the process (226a).

Lynn did not recall ever having identified the photographers to Petitioner and Petitioner never expressed any curiosity as to their identities or backgrounds (121, 132, 133a) or the extent of their participation and knowledge in this highly secretive counterfeit operation. While Lynn testified that Petitioner purchased the vacuum frame for use in the process (61a), the Seller of the vacuum frame failed to identify Petitioner but opined that Lynn looked like one of the Purchasers (153a).

Lynn stated that two or three days after receipt of the vacuum frame (which could not have been earlier than June 2) he began a two-day period of experimentation (68, 69a). After completion of his experiments on June 6th or 7th, he advised Petitioner that he was ready to proceed (71a). According to Lynn, Petitioner came to Youngstown on the next evening (June 7th or 8th) and remained from 9:00 P.M. until after midnight while plates were being made. On the following evening (June 8th or 9th) Petitioner allegedly assisted in the counterfeit process (81-84a), having arrived at 8:30 P.M. and remaining until 6:00 A.M. on June 9th or 10th (87a).

If Petitioner were working at the Coral Bar, as the owner and the business records thereof bear out, he could not have been in Youngstown, as represented by Lynn, and as charged in all counts of the indictment.

Lynn further testified that after Petitioner's second night in attendance at the counterfeit operation, i.e. *June 9th or 10th*, Petitioner packaged and placed in a two-handled "duffel bag" (131a) Sixty-Five Thousand ($65,000.00) Dollars of counterfeit Twenty dollar bills and departed with instructions not to dispose of the balance of the currency inasmuch as Petitioner would return therefor (85a). Lynn received no compensation for his efforts (191a).

In regard to the matter of counterfeiting race track tickets, Lynn is, in contrast to other detailed phases of his testimony, in sequence, vague, vacillating, and finally positive (134-136a);

Several aspects of Lynn's testimony were in direct conflict with his previous representations to the Secret Service (100, 101; 121, 122a).

REASONS FOR GRANTING THE WRIT

A Writ of Certiorari should be granted in this matter because this Petitioner has been denied due process of law; there is conflict with the decisions of other courts of appeals on the several issued herein; the decision of the Circuit Court of Appeals conflicts with applicable decisions of this Court with respect to the several issues herein; and the Circuit Court of Appeals has sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.

Petitioner asserts that:

I. In regard to the conspiracy count upon which petitioner was convicted, both lower Courts have sanctioned a doctrine vitiating the vital element of "agreement".

II. The Court of Appeals, despite the contents of the transcript, sustained the District Court in its preclusion of Petitioner from impeaching an obviously hostile defense witness whose pretrial statements, all appearing in the record, conflicted with her testimony on trial. The Court of Appeals thus ignored its own previous pronouncement, relating to the impeachment of hostile witnesses, those of this Court and those of other circuits.

III. The Court of Appeals sustained the District Court in its exclusion of relevant, material and competent defense matter tending to establish the impossibility of Petitioner's participation in the offenses alleged, and demonstrating the

attempted extortion of Ten Thousand Dollars ($10,000.00) from Petitioner for truthful testimony.

IV. The Court of Appeals sustained the District Court in its tenuous inferences, in its findings and in its judgment, the evidence whereupon same were predicated having been uncorroborated and highly implausible, and having emanated substantially from an alleged accomplice and co-conspirator.

ARGUMENT

1. Can A Defendant Be Convicted Of Conspiracy When His Alleged Co-Conspirator, As A Government Witness, Categorically Denied Voluntary Participation In The Alleged Counterfeit Operation, And Testified That He Acted Not Voluntarily, But Rather, Solely Out Of Fear And Concern For His Own Safety And That Of His Family?

Petitioner has vigorously denied and continues to deny his complicity or participation in the instant counterfeit operation—or any other such operation. It is submitted, nonetheless, solely for purposes of argument, that were the disputed testimony of the ex-convict Lynn to be accorded any degree of credibility, same falls far short of establishing, by any degree of proof, the requisite elements and characteristics of a conspiracy, as alleged in Count I of the indictment herein.

It is to be recalled that Lynn, the alleged co-conspirator, contended that his part in the preparation for manufacture and in the manufacture of the subject counterfeit currency was performed solely and only by reason of Petitioner's alleged threats of violence to himself and his family and because of his fears in regard thereto (133, 134a), and that there was never any *willingness* on his part to participate in any measure in the counterfeit operation with respect to which he attempted to involve Petitioner (134a).

Assuming then (only for purposes of argument) that Petitioner participated in the instant counterfeit operation, could there have existed a conspiracy between Lynn, the alleged co-conspirator, and Petitioner, as charged in the indictment? Can there be the requisite *agreement* when one of the two alleged co-conspirators contends that he acted solely because of *coercion and duress;* when one of such conspirators contends that he acted solely out of *fear;*

when one of such conspirators contends that he acted *unwillingly* and only by reason of threats?

> "It is fundamental that a conviction for conspiracy under 18 U.S.C. Section 371 cannot be sustained unless there is proof of an agreement to commit an offense against the United States." *Ingram v. U.S.*, 360 U.S. 672, 677, 678, 3 L.Ed.2d 1503, 79 S.Ct. 1314, (1959) reh. den. 361 U.S. 856, 4 L.Ed.2d 96, 80 S.Ct. 42. Cf. *Pereira v. U.S.*, 347 U.S. 1, 12, 98 L.Ed. 435, 74 S.Ct. 358 (1954).

The term "agreement" is defined in Ballentine's "Law Dictionary With Pronunciations", Page 59, Second Edition (1948) as follows:

> "Webster defines the term as the *union* of *two or more minds* in a thing done or to be done; *a coming or knitting together of minds.* Bouvier defines it as a *coming together of parties in opinion or determination;* the *union of two or more minds* in a thing done or to be done; *a mutual assent to do a thing.* Bouvier further says it consists of *two persons being of the same mind, intention or meaning concerning the matter agreed upon . . .*" (emphasis supplied).

Considering Lynn's testimony as to unwilling participation and action induced solely through *fear*, it would appear manifest that the Government's own testimony, elicited through its own witness conclusively disproves the existence of a conspiracy. The District Court, in *U.S. v. Markowitz*, 176 F. Supp. 681, 684 (DC Pa, 1959) stated:

> ". . . a conspiracy may be defined as an *agreement* between two or more persons to achieve an unlawful object. The *essence* of the crime is the *agreement* on the part of *each* party to effect the object involved. *They must each intend* the accomplishment of the object; and they must *agree* on this." (emphasis inserted).

It is fundamental that an individual cannot conspire with himself. *Mackreth v. U.S.*, 103 F2d 495, 496 (CCA 5, 1939).

Thus, if Lynn did not enter into willing agreement; if there was not a union, a coming together, a knitting of minds; if there was no *intention* on the part of Lynn to further the scheme about which he testified; if his actions were compelled solely through fear (he contends that he did not profit through Petitioner from the alleged venture (85a)) there can be no conspiracy.

> "A conspiracy cannot be committed by a single individual *acting alone*; he must act *in concert* with at least one other person." (emphasis inserted) *Herman v. U.S.*, 289 F2d 362 (CCA 5 1961).
>
> "A corporation cannot conspire with itself any more than a private individual can." *Poller v. Columbia Broadcasting System, Inc.*, 289 F2d 599, 603 (CCA DC, 1960), Cert. granted, 365 U.S. 840, 5 L.Ed. 2d 807, 81 S.Ct. 804 (Appeal pending).
>
> *Haggs v. U.S.*, 272 F2d 478, 483 (CCA 4, 1959).

The essential elements of both civil and criminal conspiracies are identical. *U.S. v. American Precision Products Corp.*, 115 F. Supp. 823 (DC NJ, 1953).

The fatal weakness of the Government's attempted proof in relation to its purported conspiracy charge in the instant matter and the fallacy of its contention in regard thereto is emphatically demonstrated in the words of the court in *U.S. v. Saglietto*, 41 F. Supp. 21 (DC Va., 1941). Saglietto, the master of an Italian merchant ship which had availed itself of the neutral sanctuary of a Virginia seaport immediately upon Italy's entry into World War II, was charged with and convicted of, among other things, conspiring to damage the motive and navigational facilities of his ship. The evidence reflected that under the Italian law of that time all Italian merchant marine personnel automatically became members of the Italian Navy upon Italy's entry into the war and thus subject to naval discipline. Defendant, as master of the ship, was ordered by the Italian Naval

Attache to effect the damage charged. Defendant, as a member of the Italian Navy, ordered two of his crewmen to accomplish the damage ordered, which damage was accomplished. The Court, in determining the invalidity of the conspiracy conviction of Saglietto, stated:

> "an *essential* of a conspiracy is that there should be an *agreement* or *understanding willingly entered into by all the parties to it* for the accomplishment of an unlawful purpose. *It necessarily involves a concert of action*, not in the performance of the overt act, but *in reaching the agreement or understanding which is the first necessary element of conspiracy* and in pursuance of which the overt acts must be done . . . Participation in a crime *actuated solely by compelling fear of personal harm negatives the very requisites of conspiracy.*" (emphasis inserted).

Thus the Court, in requiring an agreement or understanding willingly entered into as the prime element of conspiracy, succinctly gives voice to the concept that the quintessence of conspiracy is agreement—a willing union, a combining or knitting of minds with a view toward the furtherance of a mutually intended objective.

> "*Phelps v. United States*, 160 F2d 858 (CCA 8, 1947) reh. den. 161 F2d 940, cert. den. 334 U.S. 860, 92 L.Ed. 1780, 68 S.Ct. 1525.

The Supreme Court of the United States, in *U.S. v. Falcone, et al.*, 311 U.S. 205, 210, 61 S.Ct. 204, 207, 85 L.Ed. 128 (1940), asserted that:

> ". . . the *gist* of the offense of conspiracy *is agreement* among the conspirators to commit an offense attended by an act . . . to effect the object of the conspiracy." (emphasis inserted).

The Supreme Court again, in 1954, stated the controlling necessity for proof of agreement in regard to conspiracy charges in *Pereira v. U.S.*, 347 U.S. 1, 11, 74 S.Ct. 358, 364, 98 L.Ed. 435 (1954):

> "The essence of the conspiracy charge is an agreement . . . The charge of conspiracy requires proof . . . of an agreement to commit an offense against the United States . . ."

The courts have uniformly adhered to the axiom that the gist of the offense of conspiracy is *agreement* among the conspirators.

> *Clark v. U.S.*, 213 F2d 63 (CCA 5, 1954).
> *Schneller v. U.S.*, 143 F2d 544 (CCA 6, 1944).
> *Schnautz v. U.S.*, 263 F2d 525 (CCA 5, 1959, cert. den. 360 U.S. 910, 3 L.Ed. 2d 1260, 79 S.Ct. 1294.
> *Rent v. U.S.*, 209 F2d 893 (CCA Tex., 1954).
> *Carlson v. U.S.*, 249 F2d 85 (CCA 10, 1957).

This Court held in *Schneller v. U.S.*, 143 F2d 544, 549 (CCA 6, 1944) that:

> "Conspiracy involves the element of agreement, the existence of a *single* design for the accomplishment of the *common purpose*." (emphasis inserted).
>
> Cf. *Poliafico v. U.S.*, 237 F2d 97, 104 (CCA 6, 1956), cert. den. 352 U.S. 1025, 1 L.Ed. 2d 597, 77 S.Ct. 590; reh. den. 353 U.S. 931, 1 L.Ed. 2d 725, 77 S.Ct. 718.

The Court, in *Black v. U.S.*, 252 F2d 93 (CCA 9, 1958), stated, on page 94, with regard to that which is *punishable* in the offense of conspiracy:

> "While the law requires overt acts to complete criminal conspiracies, the *essence* of the offense of conspiracy, *that which is punished, is the 'agreement'*". (emphasis inserted).

It is believed patent that the element of "intent" must necessarily be present in order that there may be a conspiracy, an aspect which is completely lacking in the Government's evidence relating to conspiracy in the instant case.

> *Rent v. U.S.*, 209 F2d 893 (CCA 5, 1954).
> *Mackrell v. U.S.*, 103 F2d 495 (CCA 5, 1939).

The Circuit Court of Appeals, in its opinion, quotes with apparent approval the following statement of the District Judge, which appears on page 623 of Appellant's Appendix:

> "There isn't any question but what Lynn went along with the deal as he understood it and as he stated it—and, I'll get to that in a minute. *He was unwilling, but he acquiesced,*" (emphasis inserted).

It is submitted that coerced acquiescence as a predicate for conspiratorial culpability is not consonant with the concept of voluntariness incident to the requisite mutuality of assent—the union of minds—the intention to confederate—associated with conspiracy.

While the Circuit Court states that the trial judge had a right to believe or disbelieve all of the details as narrated by Lynn and to draw all reasonable inferences from the testimony as a whole, it is believed that such a solution fails to comprehend:

(a) The suspicion, generally speaking, with which *all* of the testimony of a hostile co-conspirator should be received.

(b) The suspicion in the instant case which would seem logically to attach to all of the testimony of such witness if his negative testimony, from the prosecution view point, relative to an essential element, is not believed credible.

(c) The overall implausibility of the testimony of such witness (Cf. Fourth Argument).

(d) The question as to whether such evidence—regarded either generally or with respect only to the vital element of "agreement"—can be considered as proving the offense of conspiracy beyond a reasonable doubt.

(e) The propriety of an inference of guilt from an overall scrutiny of evidence which is as probative of innocence as of guilt.

In the case at bar, it is submitted that inasmuch as the Government's witness, Lynn, testified that he was not a

willing participant in the alleged counterfeit scheme, that he was fearful and acted only and solely through fear, that he did not have a community of interest and a union of intent, the Government has failed to establish the first requisite incident to a conspiracy conviction, and that the "guilty" finding of the trial court and the sentence consequent thereupon should be reversed.

2. **Was it Proper to Foreclose Petitioner in His Efforts to Impeach a Defense Witness Who Had, Prior to Trial, and in the Presence and Hearing of Other Witnesses, Corroborated Petitioner Regarding a Crucial Element of the Defense, But Who, Upon Trial, Testified Contrary to Such Previous Statements, Defense Counsel Having Been Fully Aware of the Nature of Such Pretrial Statements, as Was Apparent From the Record?**

Mrs. Shirley Lynn, wife of the counterfeiter Hugh Lynn, was present in the Federal Building throughout most of the trial. Although her husband had testified that she was present at all of Petitioner's alleged visits to their home (34; 36, 38, 39, 41, 42, 83a), the Government did not call her as a witness to corroborate Lynn's testimony. Defendant, however, did call Mrs. Lynn as a witness (290, 302a) for the purpose of corroborating Petitioner's testimony that he had visited the Lynn home on only one occasion; that on that occasion he had discovered the fact that Lynn and Gamblin were engaged, not in counterfeiting race track tickets, but rather in counterfeiting United States currency; and that Petitioner had thereupon become enraged and had attacked Lynn, Gamblin and Mrs. Lynn.

On March 16, 1961, after Petitioner had received various anonymous telephone calls wherein the sum of Ten Thousand Dollars ($10,000.00) was asked of Petitioner, Petitioner received a telephone call from Shirley Lynn wherein

Mrs. Lynn advised Petitioner that she was going to see her husband and that they wanted "the money". On March 20, 1961, Mrs. Lynn again called Petitioner and asked him to meet her in Youngstown the next day, and to bring the money (373-375a). Petitioner, a policeman friend and Petitioner's uncle went to Youngstown the following day and heard Mrs. Lynn represent that Petitioner had been in the Lynn house only once; that Petitioner, on that occasion, had struck her; that her husband had instructed her to demand and receive Ten Thousand Dollars ($10,000.00) from Petitioner in denominations of Fifty Dollars ($50.00) or less as a pre-requisite for truthful testimony upon trial; and that she accepted Petitioner's apology for having struck her (378-382a). Thus this witness had, prior to her testimony, completely corroborated Petitioner's testimony on trial. On March 22, 1961, Shirley Lynn called Petitioner's uncle and again represented that her husband wanted Ten Thousand Dollars ($10,000.00) in denominations of Fifty Dollars ($50.00) or less. This same matter was discussed in a subsequent telephone conversation with Petitioner's uncle, the first two of which were tape recorded (479-482a). Although Mrs. Lynn denied having made such utterances, (298, 299, 300, 128a) same are clearly audible on the tapes which Petitioner offered into evidence and which were excluded by the Court. Mrs. Lynn also tried to call Petitioner after the Youngstown meeting, but Petitioner refused to accept the calls, one of which refusals was taped.

Petitioner was foreclosed in his efforts to establish, through Mrs. Lynn, the conversation which took place in the course of the Youngstown meeting and which directly corroborated his testimony to the effect that he had visited the Lynn home on only one occasion, that on this occasion he first learned of the counterfeit currency operation, and

that he thereupon reacted violently, leaving no doubt as to his hostility thereto and his lack of implication therein.

It is submitted that this evidence is and was crucial to Petitioner's defense. It is submitted that the failure of the trial court to hear and consider this evidence deprived Petitioner of a full and objective presentation of his defense and represented gross and prejudicial error. It is submitted that this matter was obviously of great relevance and bearing on the ultimate fact of guilt or innocence and was manifestly not one of the considerations upon which the Court predicated its finding of "guilty", no reference having been made with respect thereto in the Court's summation of facts.

The Court refused to permit impeachment of Mrs. Lynn on the ground that having negatively answered Petitioner's question relating to the one visit to the Lynn home: "What is there to impeach?" (291a). Thereupon Petitioner was required to proffer the substance of the foregoing fact recitation into the record. (292-285, 384-385, 481a).

It is believed that under the law and the circumstances prevailing with respect to this witness, Petitioner had a right to cross examine said witness; to go into the fact-incident [illegible] the conversation at Youngstown; to establish the prior inconsistent statements; to bring out the fact that Shirley Lynn had stated that Petitioner had visited the Lynn home on but one occasion; that Petitioner had reacted violently; that Petitioner had unequivocally evidenced his hostility to the counterfeit scheme; that Petitioner had manifested his non-participation therein; and that his failure to pay Lynn and his wife the sum of Ten Thousand Dollars ($10,000.00) accounted for the hostile and implausible testimony against him.

In *Costello v. U.S.*, 255 F2d 389 (CCA 8, 1958), the testimony of certain Government witnesses varied from the

matter contained in statements which they had theretofore given to Government personnel. The prosecution was permitted to cross examine and impeach said witnesses on the ground that such witnesses had become hostile.

With respect to hostile, adverse, reluctant, evasive, obtuse or deceitful witnesses, of which that portion of Mrs. Lynn's testimony which was permitted is an outstanding example, it was stated in *London Guarantee & Accident Co. v. Woelfle*, 83 F2d 325, 334 (CCA 8, 1936):

> "A trial court, for the purpose of expediting the trial of a case, *eliciting the truth, and furthering justice*, has a wide discretion with respect to the examination of witnesses, and may permit the cross examination within reasonable limits by the party calling him, of a material witness who is apparently hostile, adverse, reluctant, evasive, obtuse, timid or deceitful, *and . . . to permit such a witness to be interrogated as to previous inconsistent or contradictory statements.*" The rule as we have announced it is, we think that which has come to be generally applied in the trial of lawsuits. *The claim of surprise has become largely a gesture which adds little or nothing to the trial court's discretion.*" (emphasis inserted)

Petitioner's counsel had, prior to calling Mrs. Lynn as a witness, spoken with her, had advised her that he had information in regard to the Youngstown conversation, that he had information that she had affirmed the fact that Petitioner had visited the Lynn home on only one occasion and that a fight had thereupon ensued; that only the truth was desired in her testimony (291, 292a). Mrs. Lynn had thereupon represented that she would tell the truth.

In *Weaver v. U.S.*, 216 F2d 23, 25 (CCA 9, 1954) a Government witness had initially made a statement to agents of the F.B.I. concerning the offense involved therein. This witness, however, refused to testify before the Grand Jury in accordance with her previous statement. Notwithstand

ing her Grand Jury refusal, the Government called her as a witness upon trial of the matter, whereupon her testimony conflicted with the matter contained in her original statement. The Court of Appeals, in sanctioning the impeachment which had been permitted by the trial court, held:

> "The Government, however, had a right to anticipate that, *under oath and in court*, she would testify in accordance with her story to the Federal Bureau of Investigation." (emphasis inserted)

A somewhat similar situation arose in *United States v. Graham, et al*, 102 F2d 435 (CCA 2, 1939). A witness who had a previous trial of the matter at bar represented to the District Attorney that he had testified falsely in the previous trial and that he would not testify upon retrial. Nonetheless, this witness was called for testimony in the retrial and testified hostilely. The Court of Appeals, in supporting the trial court's allowance of the impeachment procedure, stated that despite the witness's representations and despite his attempt to dissuade the District Attorney from calling him as a witness, the District Attorney *was justified in believing that when actually required to testify under oath, the witness would again testify to what the District Attorney believed to be the truth.* The trial court was held to have been justified in accepting the District Attorney's representation as to surprise.

In regard to the attempted impeachment of Mrs. Lynn, the Court of Appeals, in its opinion, states:

> "Her testimony is in sharp conflict with that of the appellant *and there is nothing in the record that would give his counsel any reason to believe that she would testify in any different than she did.*" (emphasis inserted)

Petitioner must respectfully disagree with the Court of Appeals in regard to the content of the record. *It is to be*

recalled that in the instant matter Petitioner's counsel was in the possession of knowledge acquired not only from taped conversations, but also from the representations of three persons, one of whom was a police officer, relative to the subjects discussed in the Youngstown conversation.

The Youngstown conversation was testified to by Petitioner and the content of the taped conversations were proffered into the record and appear therein (292-295, 378-382, 476-482a).

The Court of Appeals states, in its opinion:

> "There was no indication of hostility or that counsel was taken by surprise, and we think the ruling was correct."

The demeanor of the witness, observable to the trial judge, was laden with hostility. The prescribed mechanics for the registration of surprise are considerably beclouded by pronouncements as to judicial discretion and the wide latitude available to the trial judge.

Richardson v. United States, 151 U.S. 303 (1894).

London Guarantee & Accident Co. v. Woolfe, 83 F.2d 325, 331 (CCA 8, 1936).

Poliafico v. United States, 237 F.2d 97, 109 (CCA 6, 1956), cert. den. 352 U.S. 1025, reh. den. 353 U.S. 931.

In *Poliafico*, the Sixth Circuit Court of Appeals stated at page 109:

> "The latitude to be allowed in the examination of a witness, who has been called and proves recalcitrant, is wholly within the discretion of the trial judge. Nothing is more unfair than to confine a party under such circumstances to neutral questions. Not only may the questions extend to cross examination, but if necessary to bring out the truth, it is entirely proper to inquire of such a witness whether he has not made contradictory statements at other times."

It is therefore submitted that the trial court erred in prohibiting the impeachment of Shirley Lynn; that in so

doing, the Court foreclosed the presentation of matter vital to the Appellant's defense; and that said action on the part of the court was highly prejudicial.

3. Was it Proper for the Court to Exclude Relevant, Material, and Competent Defense Evidence (1) Which Bore Upon the Impossibility of Petitioner Having Possessed and Assisted in the Manufacture of Counterfeit Currency; (2) Which Related to Pretrial Remarks of the Counterfeiter's Wife Which Corroborated Appellant's Testimony and Which Evidenced an Extortion Attempt Against This Defendant for Truthful Testimony; and (3) Which Related to Telephone Conversations (Which Were Taped and Offered Into Evidence) Wherein the Wife of the Government's Primary Witness Demanded Ten Thousand Dollars ($10,000.00) for Truthful Testimony on the Part of Her Husband and Herself?

Prior to discussing the several areas of Petitioner's proffered testimony which the trial court excluded, and which Petitioner submits were relevant, material and competent, it would appear appropriate to examine, briefly, the tests and considerations which the courts have applied in regard to relevancy and materiality.

The defendant, in *National Socialist Organization v. Ballal*, 245 F.2d 636, 641 (6th Cir. 1957), had attempted to introduce pertinent medical evidence, but had been foreclosed in his attempts to so do. The Court of Appeals, in pronouncing same relevant and competent, represented:

> "The question then is squarely posed: was there an adequate reason to deprive the jury of the *full truth*? Can there be here a policy which hobbles the witness to state that which is known is not the whole truth, and which denies to the jury the truth as it really is, not what it is made to seem?"

> "But presiding as we do, to administer justice, we should hesitate long either in establishing, or in acquiescing in any new rule which bars the receipt of credible, relevant, probative evidence *bearing directly on the truth of a significant issue*." (emphasis inserted)
>
> Cf. *Stauffer v. McCrory Stores Corporation*, 153 F. Supp. 710, (D.C. Pa. 1957)

"Relevancy" and "materiality" are defined by the Court, in *Weinstock v. U.S.*, 231 F2d 699, 701 (CCA DC, 1956), as follows:

> "To be 'relevant' means to relate to the issue. To be 'material' means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made."

Petitioner contends that the following excluded matter was relevant, material and competent, and that the court's exclusion thereof was prejudicially erroneous:

(A) Petitioner attempted to introduce, through his testimony (320, 321a) and that of his witness, Goldstein, owner of the Coral Bar (268a), testimony pertaining to the fact that Petitioner's required activities *after* 3:30 A.M. closing hour of the Coral Bar, which Petitioner was personally and exclusively managing for approximately seventeen (17) hours a day during the week of June 5—June 11, 1960. Petitioner's presence at the Coral Bar was additionally corroborated by business records (257-266, 273, 470-472a). It was during this week, according to Lynn's testimony, that Petitioner spent the greater portion of two nights assisting him in the production of counterfeit currency (70-74, 81-87a). This was patently impossible if Petitioner were present at the Coral Bar throughout the evenings and early morning hours of each of the days of that week until 3:30 A.M. when the establishment closed (286, 320, 321a).

and for a period of an hour or an hour and a half thereafter supervising the clean-up and closing details [sic], and accomplishing, personally, the banking procedures engaged in each day, including the days of the week of June 5—June 11, 1960 [sic—essay]. It is believed that evidence as to after-hour duties and the period of time required therefor is and was extremely important to Petitioner's defense, and that it was both relevant and material in rebutting Lynn's testimony that on two evenings during the aforesaid week, Petitioner was in Youngstown during Petitioner's duty hours at the Coral Bar in Cleveland. This evidence bore directly upon the lack of verity in the allegations of the indictment and the Government's testimony in regard thereto.

The Court of Appeals upheld the trial court in its exclusion of Goldstein's testimony "for the reason that he was not at the bar during that week, and therefore would have no personal knowledge of what Appellant did."

The Court of Appeals further stated in this connection that Petitioner having denied that he was at Lynn's house, his testimony "that he had duties at the bar after 3:30 A.M., could rise no higher than his denial and would be merely a self-serving declaration." Petitioner would direct the Court's attention to the oversight of the Court of Appeals in claiming that Goldstein had no personal knowledge of Petitioner's presence at the bar. Goldstein testified that he had telephonically spoken with Petitioner at the bar at various intervals on each evening during the week of June 5—June 11, 1960. Thus, Goldstein had personal knowledge of Petitioner's whereabouts during the crucial evenings.

Regarding the belief of the Court of Appeals that Petitioner's testimony as to his after-hour responsibilities

could rise no higher than his denial and would represent a self-serving declaration, this appears to be strange doctrine. *Should this confining concept represent the law, then it would appear that, after a denial of a basic Government contention, a defendant is precluded from presenting evidence which logically substantiates his denial.*

It is submitted that the foregoing fully qualifies this matter as one falling within that portion of the rules of this Court which relates to proceedings which have so far departed from the accepted and usual course of judicial proceedings or where such departure by a lower court has been so far sanctioned by the Appellate Court as to call for an exercise of the power of supervision of the Supreme Court of the United States.

(B) The Petitioner attempted, through his testimony (378-383a), and that of his witness, Victor Walsh, Petitioner's uncle (479a), to relate the conversations which each of them had with Shirley Lynn, wife of the counterfeiter-primary Government witness, on March 21, 1960, in the concealed presence of a Cleveland police officer and in response to her telephonic request for a meeting in Youngstown. The Court ruled same incompetent because it had taken place after the termination of the conspiracy (383a).

It is believed that same was relevant and material, both substantively and as an explanation of and a legitimate repair measure with respect to the hostile and "inaccurate" testimony of Mrs. Lynn (290, 302a). It is to be recalled that by Petitioner's proffered testimony, Mrs. Lynn, in the Youngstown conversation corroborated Petitioner's testimony to the effect that Petitioner had visited the Lynn home on only one occasion; that he had become extremely bellicose upon learning that counterfeit currency was being produced therein; that he had thereby been placed in a

compromising position; and that after berating and assaulting those present, tearing up various negatives and upsetting the printing press, he had left the premises in a state of agitation. It is to be further recalled that, by Petitioner's proffered testimony, Mrs. Lynn demanded Ten Thousand Dollars ($10,000.) for truthful testimony on the part of her husband and herself. Thus Petitioner could not have been involved in the counterfeit operation; had neither conspired with nor forced Lynn to counterfeit currency; and had neither manufactured nor possessed counterfeit currency.

(C) The Court, upon Petitioner's attempt to introduce testimony as to the content of the several telephone conversations which were had between Mrs. Lynn and Petitioner's uncle, Victor Walsh, a defense witness; ruled such conversations inadmissible (479-481a). Petitioner offered same into evidence (479a). Mrs. Lynn had thereupon made repeated inquiry into the availability of the Ten Thousand Dollars ($10,000.00) which she had previously demanded in the Youngstown conversation; represented that she had been instructed by her husband to secure delivery of same in denominations of Fifty Dollars ($50.00) and lesser denominations. The first two such conversations were tape recorded.

It is submitted that said conversations were relevant and material; that same constituted exceedingly strong evidence as to the motives of both Hugh Lynn and his wife, Shirley Lynn; that same served as an explanation and a repair measure in regard to the hostile and "inaccurate" testimony of Mrs. Lynn, who had been called as a defense witness; and that said conversations should have been considered by the Court in arriving at its finding.

4. Was it Proper for the District Court to Overrule Petitioner's Motions for Judgment of Acquittal and to Make a Finding of "Guilty" When the Evidence was Palpably Insufficient to Sustain the Court's Action in Either Respect?

Petitioner, at the close of the Government's case, moved, under the provisions of Rule 29, *Federal Rules of Criminal Procedure*, for a judgment of acquittal, which motion was thereupon overruled by the Court (156i-Viii a). At the close of all of the evidence Petitioner again moved for a judgment of acquittal, and again the Court overruled Petitioner's motion (491a). Petitioner contends that action of the Court in overruling these motions was improper and erroneous in view of the evidence adduced; and that moreover, evidence was insufficient to sustain the finding of "guilty". In addition, however, to the inadequacy of the evidence, and examination of the Court's summation of the evidence (493-512a) discloses misquotations of the evidence, misinterpretations thereof and unfounded inferences and conclusions relating thereto which are believed to be and to have been of such crucial import that the finding can, in no manner, be sustained.

In the first instance, it is to be recalled that the Government's case was predicated primarily upon the testimony of the counterfeiter, Hugh Lynn, an alleged co-conspirator and accomplice. Mr. Lynn endeavored, through his testimony, to bring Petitioner at least into an accomplice status. While it is conceded, as a general proposition, that a conviction can be predicated on the uncorroborated testimony of an accomplice, *Continental Baking Company v. U.S.*, 281 F2d 137 (CCA 6, 1960), it is submitted that such testimony must be scrutinized with caution and regarded with suspicion.

Mr. Justice Murphy stated, in *Mortensen et ux. v. U.S.*, 322 U.S. 369, 374, 64 S. Ct. 1037, 88 L.Ed. 1331 (1944), relative to the review of evidence in a criminal case:

> "But we have never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict. Cf. Abrams v. United States, 250 U.S. 616, 619. Our examination of the record in this case convinces us that there was a complete lack of relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt that petitioners transported the girls in interstate commerce 'for the purpose of prostitution or debauchery' within the meaning of the Mann Act."

In a case wherein the circumstances concededly indicated some involvement of the Appellant in the conspiracy for which he had been tried, the appellate court, in reversing upon the trial court's refusal to grant a motion for judgment of acquittal, pronounced that:

> "The Court's function, . . . is to find whether or not, taking the view most favorable to the Government, there is substantial evidence to support a verdict of guilty. In applying that rule, however *it is vital to keep in mind its exact meaning.* 'Substantial evidence' means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'. *The conclusion of a jury returning a verdict of guilty is that of guilt beyond a reasonable doubt.*" (emphasis inserted) *Riggs v. U.S.*, 280 F.2d 949, (CCA 5, 1960)

Recognition of this critical issue is voiced by the Court in *Clark v. U.S.*, 293 F.2d 445 (CCA 5, 1961) in the following words:

> "This court, although recognizing that question as to credibility of witnesses and weight of evidence are for the jury, has the right, and we may say, is under a duty to examine the record and determine whether there was any competent and substantial evidence fairly tending to support the verdict of guilt".

It is submitted that, upon a consideration of the foregoing principles and authority, the evidence in the instant matter was grossly insufficient to sustain the finding of "guilty", and that the considerations hereinbelow enumerated substantiate Petitioner's contentions in this regard.

By reason of previous reference and appendix citation Petitioner limits his comment to but a brief reference to the several aspects involved:

I. The impossibility of Petitioner having possessed or assisted in the manufacture of counterfeit currency on the dates alleged by reason of:

a. Petitioner's employment in Cleveland at the time of alleged Youngstown offenses.

b. Goldstein's testimony that he spoke, telephonically, with Petitioner at Petitioner's place of employment at the very time Petitioner is alleged to have been in Youngstown.

c. Petitioner's required presence at his place of employment due to the employer's absence during the crucial week.

d. Petitioner's preparation of banking data in Cleveland at the time he is charged with having been in Youngstown counterfeiting.

e. Petitioner's after-hour employment functions which rendered Petitioner's presence in Youngstown impossible.

II. The overall lack of credibility of the Government's case against a former detective, and the implausibility of:

a. An unprefaced approach to a stranger and the stranger's wife for the purpose of enlisting the stranger in a counterfeit operation.

b. The employment of a threat of violence to enforce cooperation.

c. Petitioner's alleged lack of concern regarding the stranger's printing proficiency, ability to counterfeit, and employment and compensation of an "outside" photographer.

III. The failure of the Government to corroborate its own prime witness.

IV. The demands upon Petitioner for $10,000.00 in consideration for truthful testimony.

V. The pre-trial corroboration of Petitioner's testimony by the counterfeiter's wife.

In addition to the foregoing evidentiary considerations, the following are representative of the misapprehensions and misapplied inferences of the trial court voiced in its summation of facts:

a. That Petitioner must have left with a duffel bag full of counterfeit currency because he had been in the Navy and sailors have duffel bags. (507a).
b. Petitioner must be guilty or he would have reported the matter to the police (502, 507a).
c. The counterfeiter would have "taken to the hills" if Petitioner were not involved (501, 502, 508a).

In *Surratt v. U.S.*, 269 F2d 240 (CCA, DC, 1959) a case in which the Court's review of the evidence upon instruction was erroneous, the appellate court reversed on the ground that such misquotation of the evidence was highly prejudicial—even though the misquotation was not raised as a ground for appeal. It is believed that the Court's misconceptions in the instant matter were decisive in contributing to the finding of guilt, particularly upon consideration of the Court's ignoral of the relevant evidence and evidentiary consideration set forth *supra* in this fourth argument.

It is submitted that the District Court's failure to consider the evidentiary matters set forth above, together with the gratuitous inferences and erroneous application of mistaken facts, deprived Petitioner of an objective finding; that the instant finding was not based in fact and evidence; that upon the evidence presented, the Government failed to establish Petitioner's guilt, involvement, or participation

beyond a reasonable doubt or by any other standard; and that the evidence in this matter does not sustain the finding of "guilty".

A complete reading of the Court's summation induces the belief that strong reliance was placed on speculation, guess, conjecture and possibilities. It is submitted that a jury should be and would have been admonished against resort to such factors in its deliberations, and that waiver of jury does not constitute a waiver of probative evidence and of predication of a finding solely thereupon.

In *Candler v. United States*, 146 F2d 424, 426 (CCA 5, 1945), it was held that:

> "The evidence is as consistent with innocence as with guilt, . . . and we are not willing to convict the defendant on the evidence as disclosed by the record here."

CONCLUSION

It is respectfully submitted that the United States Court of Appeals for the Sixth Circuit has sanctioned such departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, wherefore the Petitioner requests this Court to grant a Writ of Certiorari to the Court of Appeals for the Sixth Circuit in this matter in order that this Court may hear same on its merits.

Respectfully submitted,

ROBERT E. WALSH
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UNITED STATES DISTRICT COURT
For The Northern District of Ohio, Eastern Division

UNITED STATES OF AMERICA

vs. No. 23611
Criminal

ROBERT E. WALSH

On this 7th day of July, 1961 come the attorney for the government and the defendant appeared in person and by counsel.

It is adjudged that the defendant has been convicted upon a finding by the Court of guilty to each of counts 1, 2 and 3 of the offense of having conspired to print, photograph and execute an impression of United States Twenty Dollars bills and in fact did print and possess impressions in the simultude of genuine United States Twenty Dollars bills as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years on each of counts 1, 2 and 3 to run concurrently (total sentence—three (3) years.)

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

James C. Connell, Chief Judge,
United States District Judge.

The Courts recommends commitment to:

A True Copy Certified this 7th day of July, 1961.

(Signed) O. B. Watkins, Clerk

(By) M. Thomas, Deputy Clerk

No. 14750

UNITED STATES COURT OF APPEALS

For The Sixth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. ROBERT E. WALSH, *Defendant-Appellant.*	ON APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided July 10, 1962

Before: Cecil and Weick, Circuit Judges, and Boyd, District Judge.

Cecil, Circuit Judge. The appellant, Robert E. Walsh, was tried in the United States District Court for the Northern District of Ohio, Eastern Division, without a jury, on a three-count indictment involving counterfeiting of United States currency. He was convicted on all three counts and sentenced to imprisonment for three years on each count, the sentences to run concurrently.

The first count charged a conspiracy with one Hugh Lynn to unlawfully counterfeit United States twenty-dollar bills, without authority of a proper officer of the United States and in violation of Section 474, Title 18 U. S. C. The second count charged the appellant with counterfeiting United States twenty-dollar obligations, and the third count charged that he had such a counterfeit obligation in his possession, knowing it to be counterfeit, with the intention of selling and illegally and fraudulently using it.

Upon consideration of the record in the case, we find that there was ample evidence of the appellant's guilt to warrant the trial judge in denying his motions for acquittal

at the close of the government's evidence and at the close of all of the evidence. It was sufficient, too, to justify a finding of guilty by the trier of the facts.

We turn now to the particular assignments of error. It is claimed that the trial judge erred in not permitting the defense counsel to impeach and cross-examine a defense witness, Shirley Ann Lynn, the wife of the counterfeiter. We find no merit to this contention.

This witness is the wife of Hugh Lynn, the alleged co-conspirator of the appellant, and who was the chief witness of the government. Her testimony is in sharp conflict with that of the appellant and there is nothing in the record that would give his counsel any reason to believe that she would testify any differently than she did. The government did not put her on as a witness. The defense put her on the witness stand as its own witness and it appears that counsel for the appellant then sought to cross-examine her as though she had been called by the government. She was asked how many times Mr. Walsh had been to her house and she answered, several times. She was then asked if she had not, in a conversation with the appellant, on March 21, 1961, in the presence of his uncle, said that he was there only once and that a fight had ensued. She said: "I had not stated that." Counsel then asked leave to impeach her. The trial judge said: "She denies what you have said. What is there to impeach?" There was no indication of hostility or that counsel was taken by surprise, and we think the ruling was correct.

The court gave counsel leave to make a proffer out of his hearing and cautioned counsel for the government to check the proffer with the witness. Counsel for the appellant then made a long proffer, the substance of which was primarily to the effect that the witness, if permitted to

testify under cross-examination, would testify that she and her husband had agreed to testify favorably to the appellant for ten thousand dollars ($10,000). Counsel for the government then questioned her and she denied that she would testify to any such story.

Examination by counsel for appellant was resumed on the record. Further questions were asked concerning the ten thousand dollars and the March 21st date. The substance of this was that the *appellant had offered her ten thousand dollars ($10,000) for her testimony.* This further examination ended with a conference at the bench, after which both counsel said there were no further questions. No ruling by the judge appears in the record at this point.

Another assignment of error is that the court refused to admit testimony on the part of Dan Goldstein and the appellant that the appellant's duties at the Coral Bar kept him busy for an hour or an hour and a half after the bar closed at 3:30 a. m. The purpose of this was to show that the appellant could not have been at Hugh Lynn's house at night, between June 5th and 11th, as testified to by Lynn. The court excluded the testimony of Goldstein for the reason that he was not at the bar during that week and therefore would have had no personal knowledge of what the appellant did. The appellant denied that he was at Lynn's house, as testified to by Lynn. His testimony that he had duties at the bar after 3:30 a. m. could rise no higher than his denial and would be merely a self serving declaration. We find no error in the exclusion of this testimony.

A further claim of the appellant with reference to evidence is that the court erred in excluding testimony of the appellant and his uncle, Victor Walsh, concerning an alleged offer of Shirley Lynn that she and her husband,

Hugh Lynn, would testify favorably to the appellant for ten thousand dollars ($10,000). In support of this claim counsel says in his brief, "It is believed that same was relevant and material, both substantively and as an explanation of and a legitimate repair measure with respect to the hostile and 'inaccurate' testimony of Mrs. Lynn." To repair Mrs. Lynn's hostile testimony! This is an amazing claim since the defense put her on the witness stand as its witness and as we previously said, with no reason to believe that she would testify any differently than she did. The effort to connect this alleged offer up with Hugh Lynn through a Mr. Donald Long, an ex prisoner, in the jail utterly failed. Long testified that Lynn said he would give him a thousand dollars ($1,000), if he would tell Walsh that he, Walsh, should give Lynn's wife ten thousand dollars ($10,000). Lynn did not tell him what the money was for and, so far as the record is concerned, the message was never communicated to Walsh. This was in February 1961, and Lynn had already made statements to Secret Service agents involving Walsh. (Defendant's Exhibit A.) We find no merit in this claim.

The further claim that the court erred in excluding testimony as to the content of several telephone conversations between Mrs. Lynn and Victor Walsh concerning the alleged ten thousand dollar ($10,000) offer is equally without merit.

One other claim made by counsel for the appellant is that the appellant could not be convicted on the conspiracy count, for the reason that there is no proof that he ever entered into an agreement with Lynn. The theory of this claim is that Lynn testified that he was forced into the counterfeiting project by Walsh through fear; that entertaining it by fear he did not agree to it and Walsh could not

make an agreement with himself. Thus an agreement, the essential element of conspiracy, was lacking.

The trial judge found, "There isn't any question but what Lynn went along with the deal as he understood it and as he stated it—and I'll get to that in a minute." He was unwilling, but he acquiesced." The judge saw and heard the witnesses and he heard the whole story of the project. He had a right to believe or disbelieve all of the details as narrated by Lynn and he could draw all reasonable inferences from the testimony as a whole. We conclude that there was ample evidence to support a finding that the co-conspirators agreed to enter into the counterfeiting enterprise, as charged in the first count of the indictment.

The appellant was given equal concurrent sentences on each count of the indictment. The judgment must be affirmed, if valid sentences were imposed under either of the other counts of the indictment. *United States of America* v. *Barter*, . . . F. 2d . . . C. A. 6, June 15, 1962; *Davis* v. *United States*, 269 F. 2d 357, 363, C. A. 6, cert. denied, 361 U. S. 919; *Standley* v. *United States*, 245 F. 2d 427, 435, C. A. 6; *Strauch* v. *United States*, 223 F. 2d 377, 378, C. A. 6, cert. denied, 350 U. S. 836; *Singer* v. *United States*, 208 F. 2d 477, 480, C. A. 6; *Hirabayashi* v. *United States*, 320 U. S. 81, 85.

The evidence fully supports the convictions on all counts of the indictment and finding no error in the record, the judgment of the District Court is affirmed.

JUDGMENT

July 10, 1962

Appeal from the United States District Court for the Northern District of Ohio.

This Cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

Lester L. Cecil,
United States Circuit Judge

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No. 306

In the Supreme Court of the United States

OCTOBER TERM, 1962

ROBERT E. WALSH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (II 17–20; Pet. 36–40) [1] is not yet reported. The findings of the district judge sitting as a jury are found at I 493–512.

JURISDICTION

The judgment of the court of appeals (II 16) was entered on July 10, 1962. The petition for a writ of certiorari was filed on August 7, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petitioner was improperly denied leave to impeach one of his own witnesses.

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[1] The record is in two volumes. Volume I contains the indictment and a partial trial transcript. Volume II contains the government's appendix below and the orders, opinion, and judgment of the court of appeals.

[2] The claim that the conspiracy count should be set aside because Lynn testified that he joined through fear presents no

2. Whether various rulings on the admissibility of evidence were proper.

3. Whether there was sufficient evidence to sustain the conviction.

STATEMENT

The petitioner was tried and convicted by a judge sitting without a jury in the Northern District of Ohio on three counts charging the counterfeiting of United States twenty dollar bills and conspiracy to counterfeit (I 1-2, 511). He was sentenced to three years' imprisonment on each count, the sentences to run concurrently (Pet. 35).

Hugh Lynn, petitioner's co-conspirator, testified for the government (I 28–30). Lynn had been arrested in mid-July 1960, after selling some of the counterfeit bills to a Secret Service agent (I 88, 102–106) and had pleaded guilty and been sentenced in October 1960 (I 103–107). Lynn had served 12 years for armed robbery from 1943 until 1955 (I 33, 125), and had previously been convicted of other offenses (I 126). He had committed no offenses after his release in 1955 until the 1960 counterfeiting offense (I 496).

Lynn testified that he was introduced to petitioner by a mutual friend, Joe Drago, at the Happy Days Inn in Youngstown, Ohio (I 30–33, 109–112). Petitioner came to Lynn's home the following evening (I 33–34) and asked Lynn whether he had ever thought of making counterfeit bills on a multilith press which

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issue for review since the concurrent sentences are supported by the verdict on the two other counts (I 1–2, Pet. 35). *Lawn* v. *United States*, 355 U.S. 339, 359; *Roviaro* v. *United States*, 353 U.S. 53, 59, fn. 6; *United States* v. *Sheridan*, 329 U.S. 379, 381; *Pinkerton* v. *United States*, 328 U.S. 640, 642, fn. 1.

Lynn had purchased in 1956 (I 35, 116). Lynn replied he had not and that he was not interested (I 35).

Petitioner returned about three nights later, with four men in a car (I 36). He told Lynn that the "deal was already through" and that Lynn was to make the counterfeit bills (I 36–37). When Lynn refused, petitioner said, "Well, you have three nice kids there and a wife." When one of the men got out of the car and came toward the house (I 37), Lynn said, "Don't start any trouble here." Petitioner waved to the man and said, "That is all right. I don't need you," and Lynn agreed to make the bills (I 37–38).

After petitioner had brought Lynn a pamphlet on processing and developing, Lynn told him that the printing machine was in bad condition. Petitioner said he would pick it up the next night and have it re-conditioned (I 39, 41). Petitioner later took the press and returned it four or five days later with some inks and plates (I 41–42). When Lynn told petitioner that he did not know anything about photography, petitioner told him that he had to get his own photographer (I 47). Lynn had a friend, Urban Johnson, who knew a photographer and they took the photographs (I 47–48).[3] In mid-May 1960, petitioner brought Lynn special Victor Bond paper (I 82). Lynn told petitioner that a vacuum frame was necessary to put the negatives on to the plates. Petitioner

[3] Lynn, when arrested, had told the Secret Service that he had made the negatives with a portrait camera (I 100). On the stand, Lynn admitted that this was false (I 104), and said that the original statement was given to shield Johnson (I 142), who was his friend (I 121).

said that if one could not be found locally petitioner would fly to Chicago for one (I 50). Eventually petitioner did bring a vacuum frame (I 50). One evening during the week of the first of June 1960 (I 98), after some experimentation, Lynn completed the plates in petitioner's presence, finishing after midnight (I 66–74). The following night starting at 8:30 or 9:00 p.m., Lynn and petitioner printed the twenty dollar bills (I 81–83). Later they cut them and aged the bills by dipping them in a coffee solution (I 83–84). After they were dry, petitioner gathered up an estimated $65,000 worth and placed them in a duffel bag. He left at about six o'clock in the morning (I 83–87).* On cross-examination, Lynn stated this was all done under the threat to his wife and children (I 101, 133–134).

A woman who worked at Addressograph-Multigraph in Youngstown identified petitioner as one of two men who brought in a press to be repaired in May 1960 (I 3–7). Petitioner told her it was for Peerless Siding and he wanted it as soon as possible (I 8). The Service Manager for Addressograph-Multigraph identified the machine as the one he repaired. He testified that he tried to contact a Mr. Hart or Peerless Siding at the Hotel Warner to obtain some information on the press but was unable to reach them (II 1–5). The records of the Hotel Warner at Warren, Ohio, indicated that a Norman Hart and George Scanlon had registered at the hotel on May 18, 1960 (II 5–6). The desk clerk at the hotel identified

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*$10,000 worth were given to Johnson, Lynn sold some to the Secret Service, and the rest were confiscated (I 88).

petitioner as one of the two men, but could not tell which one (II 10–11). The manager of a store in Chicago identified the vacuum frame which was used in the counterfeiting operation as the one he sold to a Mr. J. Scanlon on June 1, 1960, in Chicago. He could not positively identify the purchaser (II 11–13). Petitioner was also identified as the person who, on May 18, 1960, had bought Victor Bond paper, directing delivery to his "brother," George Scanlon, at the Warner Hotel in Warren, Ohio (II 7–9).

Petitioner took the stand in his own behalf (I 303). He said he had been a policeman for the Cleveland Police Department from August 1, 1950, until November 1, 1956, during which time he was injured in a fight and had received back injuries when he was struck by a bus (I 305–314). He testified that he had worked at the Coral Bar in Cleveland since January 1, 1958, excepting, however, the period from June or July 1959 until the first week in June 1960 (I 318). While night manager at the Coral Bar, he worked until after closing at 3:30 in the morning (I 318–319).

Petitioner testified that in the spring of 1960 he had lent two of his trucks (left over from a business which had closed down), one to Charles Gamblin, and the other to his younger brother, Rupert Walsh, to help them repay $3,000 in "overcharges" on a repair job, because if they returned the money they would not be prosecuted. Petitioner's visits to the Warner Hotel in Warren, Ohio, were to check on Gamblin's progress (I 321–324). Gamblin told him not to worry as "he had a deal going" and took peti-

tioner to meet Lynn in a parking lot in Youngstown (I 325). Lynn explained they were going to print race track tickets in advance and then go to a race track, buy one mutual ticket, return to the car, overprint the proper code and winning numbers on the prepared tickets, and cash them (I 326–327). Petitioner said he declined to join in the operation (I 327). In April, petitioner accompanied Gamblin when Gamblin took a press to be repaired to the Addressograph-Multigraph in Youngstown (I 328–331). He registered at the Warner Hotel in Warren, Ohio, using the assumed name "Hart" because "In the home improvement business, in a strange town, the boss is usually called 'Mr. Hart' on the job" (I 333). Gamblin used the name Scanlon (I 333–334). Petitioner also admitted that he ordered paper from the Union Twine & Paper Company in Cleveland in April or May 1960 (I 334), and told them to deliver the paper to George Scanlon at the Warner Hotel, in Warren, Ohio (I 335–336).

During the first few days in June, petitioner again asked Gamblin for money and Gamblin told him he had "something real good going" (I 338–339). When petitioner expressed disbelief, he, Gamblin, and a Terry Hogan, who worked with petitioner, drove to Youngstown and saw Hugh Lynn (I 338–341). Petitioner testified that when he saw the money and negatives, he became enraged, tore up some of the bills, knocked down both Gamblin and Lynn, knocked over the press, struck Mrs. Lynn with his backhand, and left with Hogan (I 342–344). Terrance J.

Hogan, who was employed by petitioner, corroborated petitioner's version of the incident (I 159–177).

Petitioner testified he did not report the matter to the Secret Service or anyone else because (I 463): "Well, I felt at this time, after being in there, and knowing that area, that the best thing for me to do is to mind my own business. I knew that eventually they would be arrested. * * * Because I have never known anybody to get away with counterfeit money." Petitioner also explained that, although he "expected the Secret Service to come to me and talk to me about it, knowing that Gamblin had been associated with me," he did not go to them first because, "Well, I just felt that I—best thing I could do was to mind my own business" (I 464). * * * "Well, I was in an embarrassing position; that I had been with Gamblin at the paper store" (I 466).

ARGUMENT

1. In defense petitioner called as a witness, Mrs. Shirley Ann Lynn, wife of Hugh Lynn. The following occurred (I 290–291):

> Q Would you tell the Court, please, how many times, if any, Mr. Walsh has been at your house?
>
> A He has been at the house several times. He was the man that came to the house and threatened my husband to make counterfeit money.
>
> Q Mrs. Lynn, isn't it a fact that on March 21st, 1961,——
>
> Mr. GRIFFIN: Objection.
>
> Q —in a conversation with Mr. Walsh, in the presence of Mr. Victor Walsh, Mr. Walsh's uncle, you stated that the truth was that Mr.

Walsh had only been to your house once, and that a fight had ensued?

Mr. GRIFFIN: Objection.

A I had not stated that.

Petitioner's counsel then explained to the court that prior to calling Mrs. Lynn as a witness, counsel had told Mrs. Lynn that he had been advised that she had represented to petitioner, in the presence of a Victor Walsh, that petitioner had been to her house only once. Counsel also claimed to have told Mrs. Lynn that all she was concerned with was the truth (I 291-292). On this, counsel claimed the right to cross-examine her and the court said: "She denies what you have said. What is there to impeach?" (I 291). Counsel then made an offer of proof which the court directed government counsel to check (I 292).[5]

The witness testified that petitioner and his uncle offered her $10,000 to say that petitioner had nothing to do "with that" (I 299). There was further cross-examination as to telephone conversations with the uncle (I 299–301), at which point the judge said he was confused and that counsel was having difficulty because "* * * you try to tell her what to say" (I 301). After a bench conference, off the record, counsel stated he had no further questions (I 301).

[5] Out of the presence of the court counsel dictated an offer of proof that if he were allowed to cross-examine the witness she would testify that petitioner had been to her house only once; that she demanded $10,000 to tell the truth, and that they had a meeting and several phone calls concerning this payment (I 292–295). Government counsel reported that the witness said she did meet with petitioner and his uncle at petitioner's request, but denied making the statements attributed to her (I 295–296).

On these facts the contention (Pet. 19–25) that petitioner should have been allowed to impeach his own witness is untenable. There was no basis for a claim of surprise, for, although petitioner's counsel stated that he spoke to the witness prior to placing her on the stand, he did not indicate that she had said how she would testify. As it turned out, the witness expressly denied having said petitioner had been to her house only once and also denied having mentioned the sum of $10,000 to petitioner (I 290–291, 298). Though disappointing, this testimony gave petitioner no cause to complain. His real complaint is not that he was prevented from discrediting his own witness but, rather, that he was stopped before he could force Mrs. Lynn to change her testimony. But it is settled that one cannot place a witness on the stand and, under the guise of impeachment, obtain affirmative substantive evidence. See *Bridges* v. *Wixon*, 326 U.S. 135, 151–154; *Hickory* v. *United States*, 151 U.S. 303, 309; *Tripp* v. *United States*, 295 F. 2d 418, 424–425 (C.A. 10); *Cox* v. *United States*, 284 F. 2d 704, 708 (C.A. 8).

2. Petitioner makes other miscellaneous claims of error relating to the exclusion of certain testimony (Pet. 25–30). None, in context, have any merit.

a. Petitioner testified that he worked at the Coral Bar during the first week of June and that the closing time was 3:30 a.m. (I 318–319). He offered to show that he had a number of tasks to perform after 3:30 a.m. (I 320–321). The trial court refused petitioner's testimony on this point and declined to hear Dan Goldstein, the bar owner, as to the usual procedure after

3:30 a.m. (I 268). Petitioner now says proof of these duties would have negated his participation in the printing of the counterfeit money during the night, as testified to by Lynn (Pet. 26-28).

The proof was irrelevant. Lynn testified that he was not sure of the date of the counterfeiting activities but thought it was "within the week of the 1st of June" (I. 98). According to the payroll records, petitioner did not begin work until June 5, 1960 (I 258). Even if the week of June 5 was relevant, Goldstein admittedly did not tend bar the first two weeks in June (I 270).[6] There was no proof that Goldstein saw petitioner or talked to him at or after 3:30 a.m. on any of these nights.[7] Consequently, the "usual" procedure was not proof that petitioner was not at Lynn's home. Certainly the petitioner's own explanation could rise no higher than his general denial of participation in the counterfeiting.

b. Petitioner complains that the trial court improperly rejected proferred testimony by himself and his uncle, allegedly corroborated by tape recordings, as to Mrs. Lynn's alleged demand for $10,000 to testify in accordance with petitioner's version of the events. The testimony was properly excluded as incompetent and irrelevant. It did not bear on

---

[6] Significantly, the defense tendered no employee or other person physically present at the bar at night during the crucial period.

[7] Petitioner suggests that Goldstein's testimony that he spoke to petitioner over the telephone every evening (Pet. 27) would serve the same purpose. But this would hardly show knowledge of petitioner's presence at the bar on any specific night after 12 o'clock (See I 275).

whether petitioner and Mr. Lynn did or did not make counterfeit money. At best, it was part of petitioner's attempt to impeach his own witness, which could, in no event, help his defense.

3. The sufficiency of the evidence presents no issue warranting review by this Court. Lynn's testimony, although that of an accomplice, was sufficient to support the conviction. *United States* v. *Vita*, 294 F. 2d 524, 526 (C.A. 2), certiorari denied, 369 U.S. 823; *Marcella* v. *United States*, 285 F. 2d 322, 323, 324 (C.A. 9), certiorari denied, 366 U.S. 911; *Nichols* v. *United States*, 276 F. 2d 147, 148 (C.A. 6), certiorari denied, 364 U.S. 815. Moreover, it did not stand alone. Lynn's account was corroborated by disinterested testimony of petitioner's participation in the preliminary purchases of paper and in repair of the press. Petitioner's attempted explanation is unconvincing on the record and could properly be rejected by the trier of fact who saw petitioner on the stand.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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